(16)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 717

THE OHIO NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, LESLIE C. SMALL AND MAY SMALL INGLESH,

Petitioners,

vs.

BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR H. FRANZEN, AS TREASURER OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; ARTHUR G. HIGHGATE, LADDIE RASKA, WILLIAM G. NAGLE, WILLIAM TONYAN AND CHARLES BRAINARD, AS MEMBERS OF THE BOARD OF EDUCATION OF GRANT COMMUNITY HIGH SCHOOL DISTRICT NO. 124 OF LAKE COUNTY, ILLINOIS; AND JAY B. MORSE, AS COUNTY CLERK OF LAKE COUNTY, ILLINOIS,

Respondents.

ANSWER OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Summary of Argument.

I.

The judgment of the United States District Court did not adjudicate the validity of the bonds or coupons sued on in this case by the Ohio National Life Insurance Company. That suit was on other and prior maturing coupons. It had a wholly different subject matter. The factual basis for the claims of petitioners do not appear in this record. No where in the record of that case is it claimed the plaintiff was the owner of any bond 14-17

II.

No reviewable Federal question was presented to the Illinois courts by petitioners Small and Inglesh. They have never been parties to any case prior to this case so far as this record discloses. They are not privies of Ohio National Life Insurance Company 18

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The judgment and opinion of the Illinois court accords the same effect to the Federal court judgment it accords judgments of its courts of equal authority. This is the extent of petitioners' rights. Since the judgment and opinion of the state court applies the same rules it applies when state judgments are pleaded and proven under similar circumstances the petition must be denied 19

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ANSWER OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The respondents respectfully show, in answer to the petition for writ of certiorari, as follows:

I.

Corrections in Petitioners' Summary Statement.

The suit in the United States District Court was based on certain coupons (R. 105, 106). The answer in that suit raised no issue on the validity of the bonds or the validating act. The only issue was the right to recover on the interest coupons sued on (R. 106, 107).

The Circuit Court of Lake County did not ignore the judgment of the District Court. It did deny recovery by the Board of Education on its counterclaim the amount of interest paid on the bonds to Ohio National Life Insurance Company including the amount recovered in the District Court.

The Supreme Court of Illinois did recognize the District Court judgment and held it *res judicata* on the right of the Board of Education to recover the interest paid to the Ohio National Life Insurance Company to the extent of the interest that was the subject matter of that suit (R. 173).

The quotation from the opinion of the Supreme Court of Illinois in the petition is by way of reference to the second Orvis opinion. It is the following paragraph of the opinion of the Supreme Court of Illinois (R. 163, 164) where that court recognizes the District Court judgment and gives effect accordingly. It is there stated:

> "In the action in the Federal court, the validity of the bonds or the validating act was not made an issue. The sole question was as to the liability for interest for the period in question and this liability was adjudicated upon the assumption that the validating act was valid. Under the circumstances shown, the judgment of the Federal district court is not *res judicata* against the defendant's contention that the bonds are illegal. It would be binding only as to the amount of interest

which defendant paid by satisfying the judgment in full. In defendant's counterclaim it seeks recovery for all interest paid, but as to the amount of the Federal district court judgment for $3,025, that is final and conclusive against defendant and will be so treated in considering defendant's counterclaim on that matter."

Some Additional Facts Appearing in This Record.

The Unity of Bohemian Ladies are the owners of the first six $1,000 bonds of the 54 issued. Leslie C. Small and May Small Inglesh are the owners of the next 15 bonds, and the Ohio National Life Insurance Company are the owners of the remaining 33 bonds. All three were defendants to the counterclaim of the Board of Education in this case. The Unity of Bohemian Ladies are not petitioners here. The Ohio National Life Insurance Company was the sole plaintiff in the Federal district court case. That suit was on separate coupons. Was not on any bonds. No where in the record of the District Court proceeding is it claimed or alleged that the Ohio National Life Insurance Company, plaintiff was then the owner of any of the bonds.

It appears the Board of Education had constructed its building at a cost of $45,448.33 in excess of its debt incurring power (R. 165). That the 54 bonds were issued in part to fund this cost. These bonds were issued on the invitation of H. C. Speer & Sons Company, the assignor of petitioners (R. 72, 73). They prepared the papers and furnished the legal opinion (R. 71, 73). The Ohio National Life Insurance Company acquired its 33 bonds from a company it purchased in April 1933, which acquired them shortly after they were issued (R. 69). The ancestor of petitioners, Small and Inglesh, purchased their 15 bonds in June 1931 from Arthur E. Inglesh, who, in turn, pur-

chased them from Gospell, Vieth and Duncan, bond brokers, and they, in turn, purchased the issue from the underwriter, which was Speer & Sons Company (R. 85, 86). There is no relation between petitioner, Ohio National Life Insurance Company, and petitioners Small and Inglesh. The last two petitioners never recovered any judgment against the Board of Education prior to the present suit and never brought an action against the Board of Education until they filed a counterclaim in this case.

It further appears the petitioners did not bring to this court for review the final judgment entered in the second Orvis case after the first petition for certiorari was "denied for want of a final judgment" (312 U. S. 705, 85 L. E. 1138).

II.

Basis on Which Petitioners Now Contend This Court Has Jurisdiction to Review the Decision of the Supreme Court of Illinois.

It may be conceded the right claimed by the petitioner, Ohio National Life Insurance Company in this case is a right claimed by authority exercised under the statute of the United States.

It is not believed the petitioners Small and Inglesh had or asserted any such right.

1. It is readily conceded the judgment of the Supreme Court of Illinois rendered May 16, 1944, is a final judgment in the sense that it gives specific directions to the Circuit Court of Lake County, Illinois, to enter a judgment in favor of the Ohio National Life Insurance Company for 33/54ths of $956.32 and for 19.818% of its claim on its 33 bonds and unpaid coupons against the Board of Education, and to find and adjudge 80.182% of its 33 bonds and unpaid

coupons null and void and to enter a similar judgment in favor of Leslie C. Small and May Small Inglesh for 15/54ths of $956.32 and for 19.818% of their claim on their 15 bonds and unpaid coupons against said board of education and to find and adjudge 80.182% of the said 15 bonds and unpaid coupons null and void, and also to enter a like judgment in favor of and against the Unity of Bohemian Ladies. The Circuit Court of Lake County is bound by the law to enter the judgment just as directed by the Illinois Supreme Court. So was the County Court of Lake County, Illinois, in the second Orvis case. *People* v. *Orvis*, 374 Ill. 536, 30 N. E. (2) 28. Nevertheless, this court on petition for certiorari in that case denied the writ for want of a final judgment (312 U. S. 705, 85 L. E. 1138).

2. The judgment of the United States District Court in the case of Ohio National Life Insurance Company against the Board of Education rendered June 30, 1936, did not purport to hold the bonds in question valid and did not in fact do so (R. 163, 164). That suit was on certain coupons and was not on any bond (R. 194 to 108). The only issue raised was the right to recover on those coupons. That judgment was pleaded by the Ohio National Life Insurance Company and by it was asserted to be "*res judicata* of all issues involving the validity of said bonds or between plaintiff and said district" (R. 4).

3. There is no basis of fact for the petitioners, Leslie C. Small and May Small Inglesh, to aver the judgment of the District Court held the bonds valid. They were not parties to that case. Their bonds were not before that court. The judgment was for damages of $3,025 and the plaintiff was given leave to withdraw the coupons upon filing photostatic copies of same (R. 108). That judgment did not purport to hold and did not hold any bond valid or otherwise. There is no identity of interest of

Small and Inglesh and the Insurance Company, because they own different bonds of the issue. It is not claimed the coupons sued on by the Insurance Company were actually taken from the bonds of Len Small, who owned the 15 bonds until his death on May 25, 1936 (R. 86) as was the case in *Cromwell* v. *County of Sac.*, 94 U. S. 351.

It is not claimed the Insurance Company in its suit on its coupons also included any coupons of Len Small. There is no privity between the Insurance Company and Len Small shown by the record. To assert identity of interest does not show any interest of Len Small in the district court proceeding.

4. There was no judgment of the District Court holding bonds valid. The Supreme Court of Illinois expressly recognized the District Court judgment (R. 162, 163, 164), where it is said:

> "There is another state of facts by which plaintiffs seek to reverse the application of the rule of *res judicata* and make a judgment of the Federal district court binding on defendant. In June, 1936, the insurance company obtained a judgment in the Federal district court against defendant for $3025. It represented the interest on bonds owned by the plaintiff which had matured prior to that date and remained unpaid. Defendant filed an answer. The issues, as raised by the pleadings, show that the insurance company relied upon the validating act of June, 1935, in support of its claim that there was interest due on its bonds. But from the pleadings of that case, appearing as evidence in (fol. 39) this action, it does not appear that any question was raised as to the validity, construction or application of said validating act. The judgment entered permitted a recovery upon the assumption that the act was valid. As pointed out in the opinion in the later Orvis case, the Federal court was not the forum where the constitutionality of the validating act could be finally determined. It was

held that the final determination of such question was for the State courts and we now adhere to the holding in that case.

"In applying the doctrine of estoppel by judgment, the distinction has been made between the finality of a judgment as a bar or estoppel where the second demand is for the same cause of action and between the same parties or their privies as the former action and those cases where the second action is between the same parties but upon a different claim or cause of action. If the action is of the former class, the judgment operates as an estoppel, not only as to every matter actually litigated in such action but extends to all grounds of recovery or defense which might have been presented. (*Harding Co.* v. *Harding*, 352 Ill. 417; *Markley* v. *People ex rel. Kochersperker*, 171 Ill. 260.) If the action between the same parties is of the latter class, that is, upon a claim or demand different from the one litigated in the first action, then the parties are estopped only as to those matters in issue or points controverted in the former action and the determination of which formed the basis of the judgment. (*Harding Co.* v. *Harding*, 352 Ill. 417.) In the action in the Federal court, the validity of the bonds or the validating act was not made an issue. The sole question was as to the liability for interest for the period in question and this liability was adjudicated upon the assumption that the validating act was valid. Under the circumstances shown, the judgment of the Federal district court is not *res judicata* against defendant's contention that the bonds are illegal. It would be binding only as to the amount of interest which defendant paid by satisfying the judgment in full. In defendant's counterclaim it seeks recovery for all interest paid, but as to the amount of the Federal district court judgment for $3025, that is final and conclusive against defendant and will be so treated in considering defendant's counterclaim on that matter."

and (R. 173) where it is said:

"Defendant asked for a refund of the amount of interest it paid plaintiffs from 1931 to and including Sep-

tember 1, 1939. As previously noted, $3025 of the interest was paid in settlement of the judgment taken in the Federal court and as to the payment of that money, that judgment would be conclusive against the defendant."

5. The Supreme Court of Illinois did not fail to give full faith and credit to the said District Court judgment. This is demonstrated by the foregoing quotations from the opinion of said Supreme Court.

6. It is respectfully asserted that the Supreme Court of Illinois did recognize the judgment of the United States District Court rendered June 30, 1936, and that this case is not controlled by the cases cited by petitioners but by the cases cited in said opinion and by the case of *Cromwell* v. *County of Sac.*, 94 U. S. 351.

III.

The Question Presented.

1. The question as stated by petitioners assumes a number of facts that do not exist.

As to the petitioners Small and Inglesh, they had no judgment. There is no pretense they ever were a party to a former suit of any kind to which the board of education was a party.

As to the Ohio National Life Insurance Company, its suit was on another subject matter, viz.: certain interest coupons which were afterward paid. The interest coupons sued on in the District Court were not in the suit of the Ohio National Life Insurance Company in the Circuit Court of Lake County, Illinois, until the board of education attempted to bring them in, in its counterclaim for the purpose of recovering back the amounts paid as interest on void bonds. In that counterclaim it was shown the board

of education has collected certain taxes levied to pay interest on all of the 54 bonds and to pay principal of certain of said bonds, that the Ohio National Life Insurance Company was claiming the right to all of said fund, that if the bonds were legal, which was denied, the said Unity of Bohemian Ladies, Leslie C. Small and May Small Inglesh, had an interest in that fund and should be before the court and required to assert their rights or be barred (R. 31 to 37). It was in response to this counterclaim that Leslie C. Small, May Small Inglesh and Unity of Bohemian Ladies appeared and answered the counterclaim and in turn filed a counterclaim on their bonds and unpaid coupons. The Ohio National Life Insurance Company also filed its answer to the counterclaim of board of education (R. 19, 20). This suit of Ohio National Life Insurance Company is on the 33 bonds and unpaid coupons and is on a different subject matter from the said suit in the United States District Court. The judgment in the latter is not *res judicata* in the case.

It is not denied the District Court of the United States had jurisdiction of the parties and the subject matter. That subject matter, however, was and is a different subject matter from the subject matter of the present suit of the Ohio National Life Insurance Company. Leslie C. Small and May Small Inglesh are not parties to the District Court case and are not privies to the Ohio National Life Insurance Company. They did not set up the proceedings in the United States District Court case in their counterclaim against the Board of Education or make any claim in the Circuit Court of Lake County or in the Supreme Court of Illinois, prior to the filing of that court's opinion in this case, by virtue of the judgment and proceedings of said District Court (R. 44 to 48). Hence this Court is without jurisdiction of the petition of Leslie C. Small and May Small Inglesh.

Hence it follows that the real question presented is narrowed to the claim of the Ohio National Life Insurance Company that the Supreme Court of Illinois did not give to the United States District Court judgment the effect claimed for it by that company.

Concisely stated, the point is the Supreme Court of Illinois held the District Court judgment an estoppel only on the question decided in that case, viz.: the right to recover on the coupons declared on in that suit. That the validity of the bonds and Validating Act were not in issue and were not adjudicated by that judgment.

Respondents claim this is the factual state of the record and therefor this court is without jurisdiction of this petition of the Ohio National Life Insurance Company.

IV.

Petitioners' Reasons Relied Upon for Allowance of the Writ Are Not Adequate.

The Supreme Court of Illinois did recognize the validity and binding effect of the prior United States District Court judgment. That judgment did not deal with the bonds or coupons that matured after March 1, 1936. In its opinion the Illinois Court found this case is on a *different claim* or *cause of action* and the parties to the former suit are estopped only as to the matters in issue or points controverted in the former action and the determination of which formed the basis of the judgment. Since the validity of the bonds of the Ohio National Life Insurance Company and the validity of the 1935 Validating Act were not adjudicated by the District Court judgment, this court is without jurisdiction of this petition for certiorari.

In any event, the state court is required by the statute of the United States to give to the judgment of the Federal

court such effect and such effect only as it gives to judgments of the state court under similar circumstances. It appears the state court fully conformed to this requirement. It follows the Ohio National Life Insurance Company has no factual basis for its petition in this case.

Jurisdiction.

Respondents concede the decision of the Supreme Court of Illinois is final in the sense that the Circuit Court of Lake County is required by the law in Illinois to enter the decree directed in the opinion of the Supreme Court. Nevertheless, this court held in *People ex rel., Leaf, County Treasurer, etc.* v. *Orvis*, 312 U. S. 705, the petition in that case should be denied for want of a final judgment. The final judgment has not been entered by the Circuit Court of Lake County in this case. In the Orvis case the County Court had heard the evidence of the parties on the objections of Orvis and denied leave to file those objections on the ground of lack of meritorious defense. *The People* v. *Orvis*, 374 Ill. 536 at 537. That opinion states, at page 538:

> "Appellant contends here, that the County Court erred in finding that appellant had not sustained his objections."

And at page 545:

> "The judgment is reversed and the cause remanded to that court, for further proceedings not inconsistent with the views herein expressed."

When that case was redocketed in the County Court of Lake County, the record was before the court, the objections, the evidence of the parties, and the opinion and judgment of the Supreme Court and the only thing the County Court could do was to follow the directions in that opinion, sustain the objections and deny the application and judgment for the tax. That judgment was the final judgment.

It is suggested that it follows this court is without jurisdiction for want of a final judgment in this case.

It is further contended by respondents that there is no factual basis for the writ of certiorari, assuming the judgment and opinion of the Supreme Court of Illinois is final.

It appears the petitioners, Leslie C. Small and May Small Inglesh, had no judgment to rely on. They were not parties to the District Court judgment and are not privies of Ohio National Life Insurance Company. Therefore, this court is without jurisdiction of the petition of Small and Inglesh.

It further appears the Supreme Court of Illinois has given the same effect to the judgment in favor of the Ohio National Life Insurance Company against the Board of Education in the United States District Court that it gives to judgments of the state court under like circumstances. This is a complete compliance with the Federal statute. Therefore, this court is without jurisdiction of the petition of Ohio National Life Insurance Company.

Answer to Petitioners' Specifications of Assigned Errors.

1. Factually, the Supreme Court of Illinois did not disregard the prior judgment entered by the District Court of the United States for the Northern District of Illinois in a suit between the same parties and involving the same subject matter. The suit was between some of the same parties but the subject matter was wholly different. Also, the Supreme Court of Illinois did regard the prior judgment and give effect to it, in compliance with the Federal statute.

2. While the Supreme Court of Illinois did hold the bonds approximately 80% void, the question of the validity of those bonds is a state question on which the opinion of the Supreme Court of Illinois is final and controlling in this court under ordinary circumstances.

Said bonds had not been theretofore adjudicated valid and binding by the judgment of the District Court in favor of the Ohio National Life Insurance Company and against the Board of Education. It appears from the record in this case that that question was not submitted to the District Court for a decision.

3. The Supreme Court of Illinois rightfully held the decision of the District Court was not *res judicata* as to the validity of the bonds on the facts in this record.

4. The Supreme Court of Illinois did recognize and give effect to the provisions of Section 905 U. S. Statutes, 28 U. S. C. A. 687.

It is respectfully submitted that the petition for the writ should be denied.

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

The Validity of the Bonds and the Validating Act of 1935 Were Not Adjudicated by United States District Court Judgment.

The subject matter of the Federal District Court suit was not the same subject matter as the suit of the Ohio National Life Insurance Company in this case.

The validity of the bonds of the Ohio National Life Insurance Company and the validity of the Validating Act of 1935 were not put in issue or adjudicated in the Federal Court suit.

The complaint and answer in that suit are set forth on pages 104 to 107 of the record. The allegation of the issuance of the bonds and the existence and payment of claims against the District in like amount were mere inducement and were admitted by the answer. The allegations of paragraph 3 were also inducement. No issue was joined on these allegations. The suit was on the unpaid coupons described in paragraph 4 of the complaint. Paragraph 5 of the complaint alleges demand for payment of interest coupons, and payment refused. The prayer of the complaint was for a judgment of $3,025.00. The answer admitted the allegations of paragraphs 4 and 5 and denied that the plaintiff was entitled to the relief prayed for in the complaint, namely: a money judgment of $3,025.00, the aggregate amount of the coupons.

The judgment appears on pages 107 and 108 of the record. It merely finds the issues for the plaintiff and

assesses its damages in the sum of $3,025.00 and gives judgment accordingly.

It does not appear from the record of the Federal Court case in evidence in this case that the plaintiff in that suit, the Ohio National Life Insurance Company, had at any time owned any of the bonds. From an order in that Federal court case (R. 108) it appears that the coupons had been offered in evidence and that no bond had been offered in evidence or produced before the court.

The subject matter of the suit of the Ohio National Life Insurance Company in this case is on coupons falling due on and after March 1, 1940 (R. 3) and on bonds Nos. 23 to 55, aggregating $33,000.00, and for money had and received and for subrogation to the rights of the claimants (R. 50).

In the case of *Cromwell* v. *County of Sac.*, 94 U. S. 351, this court had before it a case where a suit had been instituted on certain coupons pertaining to certain bonds, and judgment rendered against the plaintiff, which judgment was relied upon as an adjudication of the right of the plaintiff to recover in the suit before the court on subsequent coupons and on the bonds themselves. In this case this court held that the suit before it for consideration was upon a different cause of action from the former suit on earlier maturing coupons. In the opinion in that case this court held at 352-353:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with

them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel."

Since the validity of the bonds, the Validating Act of 1935, and the coupons in suit here were not adjudicated in the Federal District Court case, that judgment was not controlling in the Circuit Court of Lake County, Illinois, or in the Supreme Court of Illinois. The said case of *Cromwell* v. *County of Sac* is a leading case in this court and has been cited as a leading case in many state courts and it is believed has been followed consistently by the courts of Illinois and other states for many years.

It is believed that when the second action between the same parties is upon a different cause of action, claim or demand, it is well settled that the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined. In such cases the inquiry must always be as to the point or question actually litigated and determined in the original action and the burden of proof is on him who invokes the estoppel.

It is quite conceivable that the Federal District Court was of the opinion (as the Circuit Court of Lake County was in this case), that, inasmuch as the Board of Education admitted the allegations of the complaint that it received the $54,000.00 and used the $54,000.00 to pay a like amount of claims against it, that it should pay interest on the amount. It is likewise conceivable that the Federal District Court was of the opinion that the amount of the coupons was an admission of the value of the use of the money, or the proper measure of damages.

II.

No Reviewable Federal Question Was Presented to the Illinois Courts by Petitioners Small and Inglesh.

Petitioners Small and Inglesh no where in the Circuit Court of Lake County allege any right asserted by virtue of any judgment recovered by themselves or their ancestor, Len Small, or by the Ohio National Life Insurance Company. While they allege they succeeded to the rights of their brother and their father they no where allege they derived any right in their property from the Ohio National Life Insurance Company judgment (R. 44, 45, 46 & 47).

The first time privity between petitioners Small and Inglesh and Ohio National Life Insurance Company is mentioned in this record and the claim put forward that the District Court judgment is available as an estoppel in favor of Small and Inglesh, is in the petition for rehearing filed in the Supreme Court of Illinois (R. 181).

It is well settled that an estoppel by judgment or by verdict can only be availed of by the parties to the judgment and their privies. There is no basis of fact in this case to classify petitioners Small and Inglesh in privity with Ohio National Life Insurance Company in the District Court case. They have failed to show any right they derived from the Insurance Company or that the Insurance Company sued on coupons for their use.

Black on Judgments, Section 549.
Schafer v. *Robillard*, 370 Ill. 92, 100.

It is elementary that a party cannot call upon a court of review to pass upon a question that was not presented to the trial court for decision.

Ludewick v. *Ludewick*, 279 Ill. 26.

Neither will a court of review pass on a question raised for the first time in the petition for rehearing.

Gaines v. *Williams,* 146 Ill. 450, 459.

III.

Where the State Court Accords the Federal Court Judgment the Same Effect It Accords Judgments of Its Courts of Equal Authority the Writ Will Be Denied.

The Supreme Court of Illinois accorded the same effect to the District Court proceeding and judgment that it accords to like proceedings of Illinois courts of equal authority.

In the case of *Dupasseur* v. *Rochereau,* 88 U. S. 130 at 135, this court held:

> "No higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the State courts in like case and under similar circumstances."

In the case of *Crescent Live Stock Company* v. *Butchers' Union,* 120 U. S. 141, at 147, this court holds:

> "It may be conceded then, that the judgments and decrees of the Circuit Court of the United States sitting in a particular state in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority."

IV.

State Law Controls.

Unless there is an estoppel that otherwise binds the respondents the Illinois state law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties.

Erie R. Co. v. *Tompkins*, 304 U. S. 64.
Huddleston v. *Dwyer*, 88 L. Ed. 933.

It must be conceded the petitioner, Insurance Company, for reasons, which no doubt seemed adequate, elected to bring this action in the state court. It did bring its first action in the District Court of the United States and in that action it declared on certain unpaid coupons without identifying those coupons with any *particular bonds*, and without disclosing in *that* record that it owned any of the 54 bonds. Having declared on that record and offered it in evidence in the state court case, it then became the function of the state court to decide the proper effect of the evidence. It must be conceded that *was* the proper function of the state court. The first question was whether the *two* cases were on the *same* subject matter. Not *similar* subject matters. The state court made the decision which happens to be supported by a decision of this court "on all fours", which decision of this court is one of its most widely cited and followed decisions. Nevertheless, it is suggested the state court in making that decision was acting within its jurisdiction and function and that decision is controlling here regardless of whether it was deciding a substantive or a procedural question of law. It was state law. Its decision was not only supported by *Cromwell* v. *County of Sac.*, 94 U. S. 351, but by a long line of decisions of the courts of many of the 48 states.

including Illinois. It next became the function of the state court to examine the record of the United States Court to ascertain just what questions were made an issue and passed upon in that record and to give effect accordingly. This the state court did. It acted within its proper function and jurisdiction. It was the court the petitioner had chosen of its own volition for its own reasons. It is confidently asserted the state court was controlled by state law. At least it was applying state law. Its decision is controlling here. Moreover, it is of no consequence whether the state court in its decision assigns the right reason or the wrong reason for its decisions. It is the decision that is important. Petitioners cannot assign the reason given in the opinion as error. Strictly speaking, the District Court of the United States is *not* the *final* tribunal to decide whether a state law is within the constitutional powers of the legislature—The particular act in question is one on which the Supreme Court of Illinois has the last word in that regard. That is all the particular sentence was intended to mean in this opinion, as clearly appears from the reading of the whole opinion.

The burden was on the petitioner to show the Federal Court case was on the same subject matter as the present case or that the legality of the petitioner's bonds was an issue in the Federal Court case and that issue was actually decided in favor of the legality of the identical bonds of petitioner Insurance Company. The legal effect of the evidence was in the state court a question of applying state law. It is confidently asserted the decision of the state court on this issue is final and binding on all courts under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

V.

This Writ Should Be Denied Under the Discretionary Powers of This Court.

It is not believed the record and facts in this case disclose a situation where the court should exercise its discretion to order the writ to issue. The finality of the judgment is at least questionable. The petitioners Small and Inglesh have utterly failed to present any case within this court's jurisdiction. The most that can be said for the case presented by the Ohio National Life Insurance Company is that of a bold assertion, not supported by a careful consideration of the facts in the record.

We most respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

ROYAL W. IRWIN,
Attorney for Respondents.

BENJAMIN F. LANGWORTHY,
Of Counsel.